December 27, 2006

David M. Spooner
Assistant Secretary for Import Administration
Room 1870
U.S. Department of Commerce
14th Street and Constitution Ave., NW
Washington, DC 20230

Re: Import Monitoring Program on Textile and Apparel Products from Vietnam

Dear Assistant Secretary Spooner:

On behalf of the undersigned companies and associations, this letter responds to the Request for Public Comment on the Import Monitoring Program on Textile and Apparel Products from Vietnam ("Import Monitoring Program"). In its request, the Department of Commerce ("Department") announced that the Import Monitoring Program will enter into force upon Vietnam's accession to the World Trade Organization ("WTO").[1]

In its Request for Public Comment, the Department has taken the extraordinary step of announcing that it "will" implement a remedy, outside the normal operation of the antidumping law, against certain as yet unspecified trading practices of Vietnamese exporters. This remedy, apparently designed to address a concern that "Vietnam may continue to offer prohibited subsidies to state-run textile and apparel industries," instead establishes an unprecedented program to monitor imports for dumping. Strikingly, the Department has made this announcement prior to receiving responses to its Request for Public Comment and without citing any legal basis for its action.

For the reasons set forth in this letter, we have serious concerns about the Import Monitoring Program. To begin, the Department has no legal authority for the establishment of the Import Monitoring Program. Furthermore, as announced, the Import Monitoring Program is certain to chill trade in textile and apparel products imported from Vietnam, as the unmitigated risk of a self-initiated antidumping proceeding and potential retroactive assessment of duties outweighs any benefits that trade with Vietnam otherwise provides. Moreover, the Department's flawed proposal is inconsistent with U.S. antidumping law because it preemptively assumes the likelihood of injurious dumping. For the same reasons, we are particularly troubled that the Department would adopt the Import Monitoring Program just as Vietnam is acceding to the WTO, and therefore entitled to U.S. adherence to the procedures prescribed in the WTO Antidumping Agreement, the WTO Dispute Settlement Understanding, and to non-discriminatory application of U.S. trade measures.

Accordingly, we respectfully submit that the intended Import Monitoring Program is unlawful and should be withdrawn. However, in the event the Department does proceed with

---

[1] See 71 Fed. Reg. 70364 (Dec. 4, 2006). The Department stated that the program will expire on January 19, 2009. Id.

implementation, the Department must first articulate what it believes to be the legal authority for its action and must respond fully to the concerns set forth below.

I. The Department Has No Legal Authority for the Import Monitoring Program

Conspicuously absent from the Department's Request for Comments is any explanation of the legal authority for the establishment of an import monitoring program on U.S. imports of Vietnamese textiles and apparel – or even any indication that the Department is seeking comments on this threshold issue. As explained below, there is no authority under either U.S. antidumping law or the WTO Uruguay Round Agreements for the announced Import Monitoring Program. The Department's decision to implement such a program is *ultra vires*.

A. The Import Monitoring Program Is Outside the Department's Narrowly Proscribed Statutory Authority to Monitor Imports

The Department has announced that it "is establishing a monitoring program on imports of textiles and apparel products from Vietnam."[2] The apparent purpose of the Import Monitoring Program is for the Department to gather data to facilitate the self-initiation of antidumping investigations where, in the Department's view, volume and value data gathered in the monitoring process warrant investigation.[3] The September 28, 2006 Letters, for their part, commit in no uncertain terms to establishment of a monitoring program to permit the Department to "conclude a review every six months as to whether there is sufficient evidence to initiate an antidumping investigation of any textile or apparel goods from Vietnam pursuant to section 732(a) of the Trade Act {*sic.*} of 1930 (19 U.S.C. § 1673a(a))..."[4]

Notwithstanding the Department's unsupported statements, it does not have broad or unfettered discretion to determine how and when to monitor imports for purposes of possible self-initiation of antidumping investigations. To the contrary, Congress tightly circumscribed the Department's monitoring authority when, in 1984, it enacted Section 732(a)(2)(A) of the Tariff Act of 1930 ("Act"), as amended.[5] Under this provision, Congress authorized the Department to monitor imports for purposes of self-initiation of antidumping proceedings only where all of the following criteria are satisfied:

- The program is established with respect to a class or kind of merchandise from a particular supplier country, where one or more antidumping orders are already in

---

2 Id. at 70365.

3 See id.

4 See September 28, 2006 Letters from United States Trade Representative Susan C. Schwab and Secretary of Commerce Carlos M. Gutierrez to The Honorable Elizabeth Dole and The Honorable Lindsey Graham, attached as Exhibit 1 to this letter. While the Department's December 4, 2006 Request for Public Comment does not mention the Administration's letters to Senators Dole and Graham, it clearly advances the Administration's initiative concerning Vietnamese textile and apparel imports as first outlined in those letters.

5 This provision is now codified at 19 U.S.C. § 1673a(a)(2)(A).

effect with respect to that class or kind of merchandise from one or more other countries;

- The Department believes there is an "extraordinary pattern" of persistent dumping from additional supplier countries (*i.e.*, U.S. importers move sourcing from country to country in order to continue dumping);

- The Department believes that this "extraordinary pattern" is causing a serious commercial problem for the domestic industry; and

- The monitoring program lasts for no more than one year.

Establishment of an import monitoring program for the purpose of possible self-initiation of antidumping investigations, absent the satisfaction of the above criteria, is outside of the Department's authority. No monitoring scheme, such as that envisioned in the September 28, 2006 Letters, has been executed since the 1984 amendment.

There is no indication that any of the above statutory criteria are met with respect to any textile or apparel products from Vietnam. There are no antidumping orders in effect on any of the textile or apparel products referenced in the Department's December 4, 2006 Request for Public Comment – much less the required "extraordinary pattern" of persistent dumping for purposes of section 732(a)(2)(A) or evidence of a "serious commercial problem." Moreover, the Department is planning a monitoring program that will operate over the course of two years, whereas the statute permits monitoring for no more than one year.

Congress' statutory limitation of the circumstances under which the Department may monitor imports for purposes of self-initiating antidumping investigations is unambiguous on its face. While the text itself leaves no room for doubt, we note that the legislative history to the Trade and Tariff Act of 1984 provides further support for the limitation on the Department's monitoring authority. Congress intended to authorize import monitoring for the specific, limited purpose of facilitating "follow-on" investigations where a domestic industry had already demonstrated injurious dumping with respect to a class or kind of merchandise, only to be faced soon thereafter with continued dumping of the same type of merchandise from other exporting countries.[6]

Indeed, the legislative history further shows that the monitoring provision Congress enacted in 1984 was even more restrictive than the corresponding provision that had been proposed in the House bill.[7] (There was no Senate provision permitting monitoring.) The more

---

[6] See, e.g., H.R. Rep. No. 98-14 Trade and Tariff Act of 1984 Hearings, Titles VI & VII, Vol. X, Pub. L. No. 98-573; H.R. Rep. No. 98-60, Trade and Tariff Act of 1984 Hearings, Titles VI & VII Vol. X, Pub. L. No. 98-573; H.R. Rep. No. 98-725, reprinted in 1984 U.S.C.C.A.N. 5127.

[7] As originally reported by the House Ways and Means Committee, in certain cases involving repeated determinations of dumping of a particular class or kind of merchandise, the Department would have been obligated either to self-initiate a new investigation or to monitor imports for at least one year for purposes of possible future self-initiation. See H.R. Rep. No.

narrowly drawn authority, which the Conference Committee accepted and finally enacted, responded to repeated concerns that the "pervasive monitoring" required by the original proposal would "have a chilling effect on trade."[8] Several members of the Ways and Means Committee who did not support the broader grant of authority noted that "{t}he trade dampening effect of such activity is obvious."[9] These concerns about the effects of import monitoring in the antidumping context apply equally today and validate Congress' limitation on the Department's monitoring authority to a narrowly defined set of circumstances, none of which are present with respect to U.S. textile and apparel imports from Vietnam.

Further, an examination of the statute as a whole confirms the finite limitation on the Department's monitoring authority. Section 732(a)(2)(A) (the persistent dumping provision) is one of only two provisions of U.S. antidumping law permitting import monitoring. The first, discussed above, limits the use of monitoring for purposes of self-initiating antidumping investigations to scenarios where orders are already in effect and the facts support certain additional, specified findings. The second involves "downstream product monitoring," as described in Section 780 of the Act, 19 U.S.C. § 1677i. As with import monitoring in the context of possible self-initiation of antidumping investigations, Congress carefully circumscribed the Department's authority to monitor imports of products "downstream" from those already subject to antidumping or countervailing duty orders. In this context, too, the Department's authority to monitor hinges on the existence of an antidumping or countervailing duty order, and is, in effect, an enforcement provision for an existing order.[10] Thus, if the statute is construed as a whole – as is required under normal principles of statutory construction[11] – it is clear that Congress did not grant the Department broad authority to devise import monitoring schemes to further the Executive Branch's trade policies, but instead deliberately limited that authority. Congress' instructions concerning import monitoring were specifically limited to the two above-described scenarios.

Moreover, the Department's general authority to administer the antidumping laws or to self-initiate antidumping investigations cannot be read so broadly as to render meaningless the

---

98-725, at 24. The provision as enacted permitted monitoring, but only upon satisfaction of the above-referenced criteria, and for no more than one year.

8 H.R. Rep. No. 98-725, reprinted in 1984 U.S.C.C.A.N. 5127, 5187.

9 Id; see also Testimony of Congressman Bill Frenzel expressing similar concerns about the trade-chilling effect of the original proposed legislation, at 95 Cong. Rec. H7907-08.

10 See Section 780(a)(1)(C), 19 U.S.C. § 1677i(a)(1)(C) ("...the imposition of antidumping or countervailing duties has resulted in a diversion of exports of the component part into increased production and exportation to the United States of such downstream product.").

11 Under longstanding principles of statutory construction, statutory schemes must be interpreted "in the context provided by the statute as a whole," and so that no provision is rendered meaningless. Harpal Singh Cheem v. John Ashcroft, 372 F.3d 1147, 1156 (9th Cir. 2004).

specific and circumscribed grants of monitoring authority conferred elsewhere in the statute.[12] The recent decision of the Court of Appeals for the Federal Circuit in FAG Italia confirms, in circumstances highly analogous to those present here, that the Department may not construe the lack of an outright prohibition in the statute as a grant of authority.[13] In that case, the court struck down the Department's conduct of a duty absorption inquiry outside the specific circumstances under which the statute permitted such an inquiry. While the statute expressly permits the Department to conduct duty absorption inquiries during administrative reviews initiated two or four years after imposition of an order, the Department took the position that the statute did not prohibit such inquiries also being conducted with respect to so-called "transition orders" (*i.e.*, orders issued prior to January 1, 2005, the effective date of the Uruguay Round Agreements Act).[14] In invalidating the Department's interpretation of the statute, the Federal Circuit explained,

> ...the statutory silence as to Commerce's power to initiate duty absorption inquiries for transition orders does not give Commerce authority to conduct such inquiries. The fact that Commerce is empowered to take action in certain limited situations does not mean that Commerce enjoys such power in other instances... Nor is there any legislative history suggesting that Congress contemplated such two or four year reviews for transition orders.[15]

The close analogy between the facts before the court in FAG Italia and the planned Import Monitoring Program is undeniable. As in that case, the Department appears to have read into the statute a grant of authority where none exists. And, as in FAG Italia, the Department has ignored the fact that Congress' grant of authority – in this case, the authority to monitor – is confined to "certain limited situations," as described above. Those "limited situations" do not encompass the actions outlined in the September 28, 2006 Letters to Senators Dole and Graham and in the Department's December 4, 2006 Request for Public Comment.

We therefore strongly urge the Department to explain the legal basis under U.S. law for the Import Monitoring Program, and if it cannot, to abandon it.

B. The Import Monitoring Program as Announced Is Inconsistent with U.S. Obligations under the Bilateral Trade Agreement and the WTO

Since December 2001, when the United States and Vietnam entered into a Bilateral Trade Agreement ("BTA"), the United States is obligated to provide most favored nation ("MFN")

---

12 As the Supreme Court held, "it is familiar law that a specific statute controls over a general one." Bulova Watch Co., Inc. v. United States, 365 U.S. 753, 758 (1961). See also Inter-Coastal Xpress, Inc. v. United States, 296 F.3d 1357, 1366 (Fed. Cir. 2002).

13 FAG Italia v. United States, 291 F.3d 806 (Fed. Cir. 2002).

14 See id.

15 Id. at 817 (emphasis added).

treatment to products of Vietnam.[16] Further, with Vietnam's accession to the WTO, any U.S. measures that restrict trade with Vietnam also must be consistent with U.S. obligations under the WTO Uruguay Round Agreements. The Import Monitoring Program, as announced, however, is inconsistent with both the BTA and U.S. WTO obligations in at least three general respects.[17]

First, under Article 18.1 of the WTO Agreement on the Implementation of Article VI ("WTO AD Agreement"), "{n}o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994..." Thus, if the United States suspects dumping of Vietnamese-origin textiles and apparel, it may only remedy such supposedly unfair trade through application of the specific measures the WTO AD Agreement authorizes. The remedy found in the September 28, 2006 Letters to Senators Dole and Graham and in the December 4, 2006 Request for Public Comment is well beyond the remedies the WTO Members negotiated. Specifically, it calls for the evaluation of import volume and value data, as well as the creation of "production templates" pursuant to criteria, as yet undeveloped, that will provide indicia of possible dumping. The WTO AD Agreement nowhere sanctions such a measure, which effectively is an investigation of possible dumping outside the procedures set forth in the WTO AD Agreement.

Second, and more fundamentally, under the MFN provision of the BTA and under the MFN rule of GATT Article I, the United States is obligated to accord to all Vietnam-origin imports treatment as favorable as that accorded to imports from any third country and any other WTO Member. The planned imposition of Vietnam-specific measures – including the development of "production templates" that the Department notionally believes will help it discern possible dumping by Vietnam-origin merchandise – cannot be reconciled with the obligation to treat Vietnam-origin imports as favorably as imports from other WTO Members. The scope of the BTA MFN provision and GATT Article I includes "all rules and formalities" associated with importation and thus encompass the Department's planned Import Monitoring Program.

Third, if the United States believes Vietnam is in violation of its WTO commitments, it must enforce those commitments through WTO dispute settlement procedures. If Vietnam fails to eliminate prohibited textile subsidies, the appropriate remedy for the United States is to seek consultations, and if these do not resolve the problem, to have recourse to WTO dispute settlement under the Dispute Settlement Understanding ("DSU"), which could lead to the re-imposition of quotas (at the 2006 quota year levels) for a one-year period. Rather than follow these procedures, the United States has instead announced in its letters to Senators Dole and Graham that it "will begin a comprehensive program to monitor imports of textile and apparel

---

[16] Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations, Chapter 1, Article 1 (December 10, 2001).

[17] The general discussion in this section of the inconsistency of the Import Monitoring Program with U.S. WTO obligations is limited to certain of the most obvious facial inconsistencies presented by the program as described in the September 28, 2006 Letters to Senators Dole and Graham and in the December 4, 2006 Request for Public Comment. Actual implementation of the program, as announced, would likely give rise to additional WTO inconsistencies, depending upon the specific approaches taken.

products from Vietnam." The U.S. actions in this regard are unilateral actions outside of the WTO dispute settlement mechanism and, thus, are violations of Article 23 of the DSU.

* * *

In sum, the Department's Request for Public Comment lacks any statement as to even the purported legal authority, under U.S. law, the BTA or the WTO agreements, for the establishment of the contemplated and unprecedented Import Monitoring Program. Furthermore, the Department appears to have moved beyond this threshold issue, as it did not explicitly seek public comment on this point. As the foregoing discussion demonstrates, the Department's proposed monitoring system violates the antidumping statute and is inconsistent with U.S. obligations under the BTA and the WTO. It may not be lawfully implemented.

II. The Consultative Process Must Cover All Aspects of the Monitoring Process and Include Electronic Notice and Access to Information

Because the mere threat of initiating an antidumping investigation can have – and has already had in this instance – serious trade-chilling effects, the Department's desire to provide interested parties with a full opportunity to provide input into all aspects of the contemplated monitoring process is appropriate, and may help the Department ameliorate the practical problems the proposed monitoring system presents. We would note, however, that no type of consultative process will cure either the trade-chilling effects of that monitoring program or the lack of legal authority to implement it. Nevertheless, below we provide comments, as requested, on the proposed consultative process.

A. Implementation of an Import Monitoring Program on an Interim Basis Would Preempt the Consultative Process

For meaningful consultations, the Department must take the substantive steps described below before implementing any monitoring program. Establishing even an interim program prior to completion of a full notice-and-comment process, including an opportunity for rebuttal comment and public hearings, unnecessarily risks implementing a misdirected monitoring program, prejudging the outcome of the consultation process, and prejudicing sourcing decisions with an inevitable result of unfairly impeding trade.

At a minimum, the consultation process should include the following elements:

- First, in addition to the initial solicitation of comments, as contained in the December 4, 2006 Federal Register notice, there must be an opportunity for the presentation of rebuttal comments.

- Second, the Department should issue a proposed rulemaking setting forth the terms of the monitoring program only after the initial round of comments and rebuttal comments, as well as the hearing or hearings suggested by the Department. Further comment should be solicited prior to issuance of a final rule.

- Third, the issuance of a final rule should precede the implementation of a monitoring program. No interim monitoring program should be established.

- Fourth, to ensure full transparency, all proceedings both in advance of establishment of a monitoring process and on an on-going basis once any monitoring process is in place must be on the record, including any *ex parte* discussions or meetings. To accomplish this, the Department should open a docket for any monitoring program, to be maintained for public inspection at Import Administration's Central Records Unit, Room B-099, as well as on its website, with all communications and contacts required to be placed on the record within 48 hours of such activities.

- Fifth, any hearings related to the monitoring process must be on the record and fully transcribed, with copies of the transcript promptly made readily available to the public. Public access should be via the internet in addition to the Import Administration's Central Records Unit. Maximum transparency could be achieved if the hearings also were simulcast live via the internet. Given the likely interest of manufacturers with facilities in Vietnam, with arguably limited resources to participate in proceedings in the United States, access via the internet and the availability of transcripts are essential to ensure both fair access and transparency.

- Sixth, if the Department treats any information it collects in the course of any monitoring program as business proprietary, it should require the submission of a meaningful public summary of such data consistent with the requirements for public summaries in 19 C.F.R. § 351.304(c)(1), and, in addition, provide access to the business proprietary data pursuant to procedures similar to those set forth in 19 C.F.R. § 351.305 for Administrative Protective Orders in proceedings.

We also recommend that the Department provide those commenting with the option to submit comments solely via electronic mail (and not also in hard copy), in order to accommodate interested persons not located in the United States, for whom meeting tight deadlines would be more difficult if they were required to send original hard copies via international mail. The Department also should consider establishing an "email notification system," in addition to Federal Register notifications, to ensure maximum distribution of information and opportunity for input by interested persons. Such an email notification system could be used to disseminate any data that is made publicly available on a monthly basis and/or to notify interested persons that data has been posted on the Department's website and is available for review and comment.

The Department also should make submitted comments available for review online via the internet, in addition to the Central Records facility. Precedents for both the email notification process and online access to public comments exist at the Department. The Office of Textiles and Apparel established an email notification system to implement the "CAFTA commercial availability" petition process and online access to comments are in place both for the CAFTA program and under the Import Administration's "Public Comments Files."

B. Definition of Interested Parties

Subject to the two caveats discussed below, the participants in the consultation process should be any interested parties. The full range of interested parties is domestic producers of the product like that imported from Vietnam, any associations composed of those producers, workers

in domestic facilities producing the like product, U.S. importers and retailers of the subject imports, manufacturers, vendors and/or exporters of the subject imports and their associations, and the Government of the Socialist Republic of Vietnam.

The first caveat is that because the textile and apparel industries encompass many different types of products, interested parties will vary by product. Thus, interested parties with respect to one product may not be interested parties with respect to another product. For example, the Department in consultations about women's cotton sweaters, Harmonized Tariff Schedule of the United States ("HTSUS") 6110.20.20.20, would not consult with producers of an upstream product, such as yarn, cotton, or components for that sweater. This distinction is critical for purposes of the mechanics of the monitoring system, and reflects requirements of the antidumping rules, as discussed in more detail below.[18]

The second caveat is that other than Vietnamese producers of textile and apparel, the Department should not consider as interested parties other foreign producers of garments sold in the U.S. market. This limitation would apply to foreign producers who make garments from U.S. fabrics or yarns or from parts cut-to-shape in the United States, *i.e.*, "outward processing producers."[19] As provided in Section 771(7)(b)(III) of the Act, the relevant injury issue in an antidumping investigation is "the impact of {subject} imports . . . on domestic producers of like products, but only in the context of production operations within the United States." Accordingly, outward processing producers cannot possibly be considered interested parties within the context of the consultative process because their production is located outside of the United States.

C. Hearings Are Appropriately Conducted in Washington, but Should Be Simulcast Via the Internet

The Department suggests the possibility of conducting hearings on the monitoring process outside Washington, D.C. We believe that Washington, D.C.-based hearings will provide a full opportunity for a complete range of views to be presented. While we strongly support maximum transparency and participation, we caution the Department to consider whether hearings outside Washington would likely be primarily media events, further politicizing an already highly political process that has singled out trade from one source and further chilling trade. Any field hearings, as with hearings conducted in Washington, should be for the purpose of hearing from those who are appropriately considered interested parties, as discussed previously. If the Department does determine to hold field hearings, the Department

---

[18] As discussed below, with respect to the products to be monitored, a domestic yarn or fabric producer would not be in a position to request monitoring or provide injury data with respect to a particular apparel product.

[19] The fact that one office within the Department may have perceived, in the context of a safeguard proceeding, that "the U.S. industry has become closely consolidated with outward processing operations located in certain trade preference countries" (see Footnote 1 to each of the U.S. Statements of the Reasons and Justifications for the U.S. Request for Consultations with China Pursuant to Paragraph 242 of the Report of the Working Party on the Accession of China to the World Trade Organization) does not mean that producers in those non-U.S. facilities are relevant for purposes of the contemplated antidumping monitoring process.

must hold such hearings in locations where retailers and other importers may participate, such as in New York or California. Any hearings held on this matter should be simulcast via the internet.

* * *

While the consultative process will help the Department bring all relevant issues to the fore, it still does not address the core underlying flaw, which is that the Department lacks the legal authority to establish or implement the proposed Import Monitoring Program. Notwithstanding our serious concerns in that regard, below we recommend certain mechanics for the monitoring system in the event that the Department decides to proceed despite its lack of legal authority to do so.

III. Proposed Monitoring System

In light of the Department's apparent decision to move forward with the monitoring program, despite its lack of legal authority, we provide below recommendations for how the Department should (i) identify the limited products to monitor; (ii) biannually evaluate the gathered data; and (iii) only to the extent necessary, self-initiate antidumping proceedings. Our suggestions below are without prejudice to our earlier comments and are in no way meant to imply that any proposed monitoring system would be lawful.

A. The Department Must Carefully Identify the Imports It Will Monitor

The Department may not monitor any imported product as to which there is no corresponding domestic production of an identical product. Therefore, in order to identify the imports that it will monitor, the Department must first determine the products that the domestic industry itself produces for sale in the U.S. commercial market and the particular imported products that are of interest to those producers for monitoring. In this process, the Department must require interested domestic producers who seek monitoring to step forward and provide information pertaining to precisely what each produces, where it produces it, and whether it would be willing to supply data relevant to an injury assessment. As discussed below, the domestic industry and the Department will need to "classify" or "harmonize" domestic production with the appropriate 10-digit HTSUS classification. After identifying precisely what domestic production exists in the United States, the Department must then categorically exclude from eligibility for monitoring certain product groups, such as imports that are like U.S. production already protected from import competition under federal, state, and local government procurement law. Finally, the Department should identify where there is a genuine match between the U.S. production and Vietnamese imports and issue for public comment a proposed list of such imports to monitor.

1. The Department Must First Identify Domestically Manufactured Products for Sale on the U.S. Commercial Market

At the outset, any imported product potentially subject to monitoring should be identical to a domestically produced product for sale on the U.S. commercial market. We recognize that when a domestic industry files a petition, the domestic like product need not be identical to the subject imports. In this extraordinary proposed monitoring system, however, given the chilling effects on trade, for purposes of monitoring, the Department should require a very precise and narrow match between the domestically produced product and the import subject to

monitoring.[20] Limiting the products monitored and ensuring monitoring of only imports also produced by domestic manufacturers may reduce the chilling effect of this program.

By statute, in any antidumping proceeding, whether initiated through an industry-filed petition or self-initiated, there must be a domestic "industry." The statute defines "industry" as the producers of the "domestic like product."[21] The term "domestic like product," in turn, is defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation...."[22] Thus, the Department must determine which specific textile and apparel products are made in the United States and compete in the commercial market against imported Vietnamese garments. As discussed above, for purposes of this extraordinary monitoring measure, the domestic product and monitored imports should be identical.

To determine what domestic industries exist and the appropriate imported products to be monitored, if any, the Department must issue a Federal Register notice, requiring any domestic producer that seeks monitoring of any imported product from Vietnam to provide the following information:

1. The identity and location of the U.S. producer and its manufacturing facilities, including its facilities located outside of the United States, and a detailed description of the nature of the production process at each domestic and offshore facility;

2. a detailed description of the U.S. producers' products' physical characteristics and uses – i.e.:

    * What is the product type?
    * What is the fiber content?
    * Is it knit or woven?
        - If knit, what is the stitch count?
        - If woven, what is the weave type?
    * Is it for men, women, boys, or girls?
    * Does it have any special features, like water-resistance?
    * If a garment, is it part of an ensemble?;

3. the identity of all other U.S. producer(s) of the product and the location(s) of the U.S. manufacturing facilities in which they produce the product, and the percentage of

---

20 We note that even under rules applied to industry-filed antidumping petitions, a yarn or a fabric is not like, or even most similar to, a garment for purposes of the requisite like product analysis. Thus, a yarn or fabric cannot be identical to a garment and cannot be the basis for monitoring imported garments.

21 19 U.S.C. § 1677(4)(A).

22 Id. § 1677(10).

domestic production of the product represented by each U.S. producer in the most recently completed four calendar quarters;

4. the 10-digit HTSUS provision under which the U.S. producer believes its domestic production would likely be classified if it were an imported product;

5. whether the U.S. producer manufactures for both the commercial market and for U.S. government procurement (federal, state, or local), and if a producer does both, identify the percentage of production sold in the most recent calendar year in both the public and private markets;

6. whether the identified U.S. producers are willing to supply information relevant to a material injury assessment. In this regard, a certification must be required from each U.S. producer indicating its willingness to provide all information in a U.S. International Trade Commission ("ITC" or "Commission") domestic producer preliminary injury questionnaire, a sample copy of which should be posted on the Department's website or published in the Federal Register;

7. the particular Vietnamese product proposed for monitoring, including the 10-digit HTSUS classification under which it is imported and a detailed description of the imported product, including all of the information listed in item 2 above; and

8. an explanation of how the proposed product qualifies for monitoring, based on the requirement that the domestic producer produces the identical product as that imported under the identified 10-digit HTSUS classification.

The purpose of soliciting this information through a Federal Register notice at the outset of any monitoring program is to ensure that there is no monitoring for any product for which (i) there is no domestic production of an identical product for sale in the U.S. commercial market; or (ii) there are no domestic producers of the identical product that have requested monitoring. It is beyond question that if there are no U.S. producers of a product proposed for monitoring, then the Department has no basis to monitor the product. Even if there is domestic production of a product proposed for monitoring, if domestic producers accounting for at least three-quarters of the value of U.S. production during the most recently completed four calendar quarters do not certify their agreement to supply data related to an assessment of injury, then the Department similarly has no basis to monitor the imported product.[23] Finally, to minimize uncertainty and the chilling effects on trade, the opportunity to request monitoring should be limited to this initial Federal Register notice.

---

[23] As a basic starting point, the Department needs to know -- prior to monitoring -- whether the relevant segment of the domestic industry will cooperate in providing the Department with the information it will need to analyze injury in the event that the Department self-initiated an antidumping investigation on a certain import or imports. This commitment from the domestic industry to provide injury data at the outset of the monitoring process is a key component, for without that commitment the Department has no assurance that it will be in a position to obtain the requisite injury information in connection with the biannual evaluation process, discussed later in these comments.

2. Domestic Production Must Be Identified By HTSUS Classification

For purposes of monitoring, identification of the products should be based upon specific HTSUS numbers. Identification of domestic production cannot effectively or reasonably be based upon broad product categories such as those created for the purposes of the U.S. Textile Quota Program. While the three-digit category system created decades ago to implement U.S. quantitative import restraints may be a familiar lexicon in the industry, these categories are overly broad and could not be used for purposes of either an antidumping investigation or the Department's proposed monitoring program. For example, a review of the numerous tariff classifications included in a single U.S. textile quota category, "men's and boys' cotton trousers and shorts" (category 347), illustrates how wide-ranging that product category is. This category includes:

HTSUS CODE	DESCRIPTION
6103.19.2015	M/B TROUSERS ETC IMP AS PT OF SUIT OF COTTON, KNIT
6103.19.9020	M/B TRSRS AS SUIT PTS OF OT TEX SUBJ COT RES, KNIT
6103.22.0030	M/B ENSEMBLES OF TROUSERS AND BREECHES OF COT, KNIT
6103.22.0040	M/B ENSEMBLES OF SHORTS OF COTTON, KNIT
6103.42.1020	MEN'S TROUSERS AND BREECHES OF COTTON, KNIT
6103.42.1040	BOY'S TROUSERS & BREECHES, NESOI, OF COTTON, KNIT
6103.42.1050	MEN'S SHORTS OF COTTON, KNIT
6103.42.1070	BOYS' SHORTS, OTH THN IMPT PRTS PLYSTS, COT, KNIT
6103.49.8010	M/B TROUSERS ETC OF OT TEX MAT SUBJ COT RES, KNIT
6112.11.0050	M/B TROUSERS FOR TRACK SUITS OF COTTON, KNIT
6113.00.9038	M/B TROUSERS KNIT COT IMPREG RESIN EX RBR/PLASTIC
6203.19.1020	M/B SUITS OF OT COT TROUS BREECH & SHRTS IMP PT ST
6203.19.9020	M/B TRSRS AS SUIT PTS OF OT TEX SUBJ COT RES,NT KT
6203.22.3020	M/B ENSEMBLES OF TROUSERS AND BREECHES OF COT,N KT
6203.22.3030	M/B ENSEMBLES OF SHORTS OF COTTON, NOT KNIT
6203.42.4003	M/B TROUSR BREECHES SHORTS COTTON CMPCT YRN NT KNT
6203.42.4005	MEN'S TROUSERS & BREECHES COTTON CORDUROY, NT KNIT
6203.42.4006	MEN'S CORDUROY TROUSERS & BREECHES COTTON NOT KNIT
6203.42.4010	MEN'S TROUSER & BREECHES COTTON BLUE DENIM, NT KT
6203.42.4011	MEN'S BLUE DENM TROUSERS & BREECHES COTTON NT KNIT
6203.42.4015	MEN'S TROUSERS & BREECHES OTHER COTTON, NOT KNIT
6203.42.4016	MEN'S TROUSERS & BREECHES OF COTTON, NT KNIT NESOI
6203.42.4025	BOYS' TROUSER ETC COT CORDRY NT PLAYSUIT PTS,NT KT
6203.42.4026	BOYS' CORDUROY TROUSERS ETC COTTON NOT KNIT NESOI
6203.42.4035	BOYS' TROUSER ETC COT BLUE DNIM N PLAYSUIT PT,N KT
6203.42.4036	BOYS' BLUE DENIM TROUSERS ETC COTTON NT KNIT NESOI
6203.42.4045	BOYS' TROUSER ETC OT COTTON NT PLAYSUIT PT, NT KT
6203.42.4046	BOYS' TROUSERS & BREECHES OF COTTON NOT KNIT NESOI
6203.42.4050	MEN'S SHORTS OF COTTON, NOT KNIT
6203.42.4051	MEN'S SHORTS OF COTTON, NOT KNIT, NESOI
6203.42.4060	BOYS' SHORTS COTTON NOT PLAYSUIT PARTS, NOT KNIT
6203.42.4061	BOYS' SHORTS OF COTTON, NOT KNIT, NESOI
6203.49.8020	M/B TROUSER ETC OT TEX MTRL SUBJ COT RSTRTS, NT KT
6210.40.9033	M/B TROUSERS RUBBERIZED TEX MTRL EX MMF, NOT KNIT
6211.20.1520	M/B WTR RES TRSER,BREECHES IMP PRT OF SKI-S NT KNT
6211.20.3810	M/B SKI-SUIT TROUSER & BREECHES COTTON NOT KNIT
6211.32.0040	M/B TRACK SUIT TROUSERS OF COTTON, NOT KNIT

In this single U.S. textile quota category, products range from boys' knit cotton shorts to men's ski suit trousers. This wide range of the U.S. textile quota categories renders them unsuitable for purposes of the Department's proposed monitoring system. Therefore, the Department must require U.S. producers to identify their production in terms of its classification under the HTSUS, as if it were an import, and to identify by reference to 10-digit HTSUS subheadings which products are "of interest" for monitoring.

3. The Department Must Categorically Exclude Certain U.S. Production

After the Department has identified the domestically produced products by 10-digit HTSUS number, the Department should categorically exclude certain product groups from eligibility for monitoring. There are three such groups.

First, any products that the domestic industry produces other than for sale on the U.S. commercial market should not be considered domestic products for purposes of the Department's monitoring system. In particular, U.S. products sold under the Berry Amendment or other "Buy America" procurement programs are already protected from import competition and, for that reason, cannot be injured by imports.[24] There is no basis for monitoring products where import competition is already limited by law.

Second, production in the United States of garment components, including cut parts, which are assembled into garments outside the United States cannot be considered domestic production of the final garment. Such garments, under longstanding origin rules, statutorily set forth under Section 333 of the Uruguay Round Agreements Act, 19 U.S.C. § 3592(b)(3), are products of the country in which they are assembled and are not products of the United States.

Third, if a domestically produced product does not fall in one of the five product groups that have been identified as "being of special sensitivity"— *i.e.*, trousers, shirts, underwear, swimwear and sweaters— then there is no basis to monitor the identical import. We note that the Department sought comment on whether or not there are particular products that could act as bellwethers for groups of product as a whole. Given the wide variety of products within each of the groups (*e.g.*, ski suit pants and jeans are both trousers) and, in addition, the seasonality within the groups (light cotton sweaters are a Spring item and wool sweaters are for Winter), it would make no sense for the Department to monitor one particular product and apply data for that product to another product within the same, larger category. A careful analysis requires that the Department separately monitor only those products that are identical to products that the domestic industry distinctly identifies as itself producing for sale on the U.S. commercial market.

With this information in hand, the Department should then identify which products imported from Vietnam, by 10-digit HTSUS number, are identical to those produced in the United States, and which otherwise qualify for monitoring by fulfilling all of the criteria set forth

---

[24] Applying the Commission like product criteria -- (i) physical characteristics and uses of the merchandise; (ii) interchangeability; (iii) channels of distribution; (iv) common manufacturing facilities, production processes, and employees; (v) customer and producers' perceptions; and (vi) price -- U.S. production for government procurement purposes, such as for the military under the Berry Amendment, are not identical to imports for the commercial market because the products do not compete against each other, have different uses, are not interchangeable, and move in different channels of distribution.

above. Using the HTSUS number is critical because a review of the import data indicates, for example, that the men's and boys' cotton trousers and shorts shipped from Vietnam do not cover all of the classifications included within the U.S. textile quota category 347. Again, by way of example, looking at the most recent available data for this category, most of the trade – 2.6 million dozen out of 3.1 million dozen – enters under only eight HTSUS classifications:

6203.42.40.10	MEN'S TROUSER & BREECHES COTTON BLUE DENIM, NT KT
6203.42.40.11	MEN'S BLUE DENM TROUSERS & BREECHES COTTON NT KNIT
6203.42.40.15	MEN'S TROUSERS & BREECHES OTHER COTTON, NOT KNIT
6203.42.40.16	MEN'S TROUSERS & BREECHES OF COTTON, NT KNIT NESOI
6203.42.40.45	BOYS' TROUSER ETC OT COTTON NT PLAYSUIT PT, NT KT
6203.42.40.46	BOYS' TROUSERS & BREECHES OF COTTON NOT KNIT NESOI
6203.42.40.50	MEN'S SHORTS OF COTTON, NOT KNIT
6203.42.40.60	BOYS' SHORTS COTTON NOT PLAYSUIT PARTS, NOT KNIT

Overall, Vietnam shipped products classified in only 23 of the 37 provisions included within U.S. textile quota category 347. Thus, any monitoring must be limited to those products within the eight 10-digit HTSUS classifications listed above, which domestic producers make for the commercial market in the United States, and only if those domestic producers certify that they will provide data with which the Department will assess the existence of material injury.

4. The Department Should Monitor Imports Identical to U.S. Production Only from State-Owned or State-Controlled Enterprises

As a final step, when identifying the imports within the HTSUS numbers that will be subject to monitoring, the Department should only monitor those products from Vietnamese state-owned or -controlled enterprises. Such a limitation is consistent with the intent of the September 28, 2006 Letters, to address the concern that "Vietnam may continue to offer prohibited subsidies to the state run textile and apparel industry." We understand that the Government of Vietnam has an obligation, under the terms of its accession to the WTO, to identify state-controlled entities, and therefore it is feasible for the Department to identify separately and monitor these imports.

Lastly, once the Department has gone through the procedures set forth above, it should identify the list of imports proposed for monitoring in a Federal Register notice, in which it should explain its determination by identifying the particular import, the domestic producer(s) of the identical product, why the Department has concluded that there is a domestic industry producing the product, and indicate that the requisite percentage of domestic producer(s) of the product have indicated a willingness to supply information relevant to an injury assessment for that product. The Department should seek public comment on this proposed list.

B. The Monitoring Program Must Impose No New Burdens on Importers or Exporters

A key concern is that the U.S. Government not place any special or additional burden on imports of textiles or apparel from Vietnam as part of the monitoring program (or as part of the biannual evaluation process, discussed below). In particular, the U.S. Government may not impose on exporters or importers any additional requirements for the submission of new information, the completion of forms, the collection of additional data or other administrative or substantive requirement other than those presently imposed in connection with Customs entry.

Not only would the imposition of new data collection or reporting requirements be unauthorized and collection of this information unnecessary, but any such additional burden on imports or importers would itself be a trade barrier and possibly unlawful under U.S. international obligations under the WTO.

While U.S. producers seeking monitoring, who will be the beneficiaries of any monitoring program, should be required to provide information essential to determine whether a product should be subject to monitoring and relevant to any injury assessment, there is no basis to impose additional information collection or reporting requirements on any imports that are considered for or subject to monitoring.

C. Biannual Evaluation Process

In its Federal Register notice, the Department asked for comments regarding the process by which it should evaluate biannually the information collected under the contemplated monitoring program. The Department is obligated to consider both dumping and injury information simultaneously prior to making an initiation determination[25] and must consider information related to these elements to ensure that any self-initiation "is warranted" under the statute.[26] In addition, the Department is required to consider industry support for any self-initiation. To the extent that the Department's biannual review process leads to a self-initiation, the Department (i) should calculate normal value consistent with the statutory scheme; (ii) ensure that there is sufficient injury and causation data on the record to support a self-initiation; and (iii) require a sufficient level of domestic support for the self-initiation. We discuss each of these issues below.

1. The Department Should Calculate Normal Value Consistent with the Statute

As a preliminary issue, we assume that the Department is genuinely considering whether an alleged normal value is necessary for purposes of the proposed monitoring system. In that regard, the introduction to the Department's December 4, 2006 Federal Register notice states that the Department "*may* find it necessary to develop production templates to assist in its evaluation of textile and apparel imports from Vietnam."[27] Earlier in its notice, however, the Department states that it "*will* develop, in close cooperation with interested parties, production templates to assist it in its biannual evaluation of imports" to determine whether sufficient evidence exists for self-initiation of an antidumping proceeding.[28] To the extent the Department has already conclusively determined it will develop "production templates," the Department's actions are on their face at odds with the Department's stated intention not to prejudge aspects of its monitoring system.

---

25 See WTO AD Agreement, art. 5.7 ("The evidence of both dumping and injury shall be considered simultaneously ... in the decision whether or not to initiate an investigation ...").

26 19 U.S.C. § 1673a(a)(1).

27 71 Fed. Reg. 70365 (Dec. 4, 2006) (emphasis added).

28 Id. (emphasis added).

Furthermore, in its Request for Public Comment, the Department uses the term "production templates." The term "production templates" is nowhere found in the statute. Without attempting to discern what the Department means by production templates, suffice it to say that the Department should only calculate a normal value for monitored subject imports in a manner consistent with both the statutory scheme and the Department's standard methodologies for non-market economy proceedings.

In that regard, we note that the Request for Public Comment also sought input on market economy countries that have similar textile and apparel industries to Vietnam, ostensibly for the purpose of identifying possible surrogate countries for the normal value calculation. The Department, which has yet to identify the merchandise it proposes to monitor, has put the cart before the horse. In order to determine an appropriate surrogate country, the Department first must identify the merchandise potentially subject to evaluation. The statute requires that the Department determine fair value for the Vietnamese imports valuing factors of production with data from one or more market economy countries that are "significant producers of comparable merchandise." Because we do not yet know the merchandise to be monitored, it is impossible to identify at this stage a market economy that produces comparable merchandise. As such, any discussion of appropriate surrogate countries is premature. After the Department identifies the Vietnamese products to be monitored, if any, it should at that point seek input on choice of surrogate country.

2. The Department Is Required to Consider Injury and Causation Data Prior to Initiation

The statute contemplates that before taking the extraordinary step of self-initiating an antidumping investigation, the Department will consider injury information because injury to a domestic industry is a necessary element for the imposition of an antidumping duty.[29] Put another way, without consideration of injury information, no self-initiation could ever be "warranted." In addition, the Department's regulations also require consideration of injury information. In this regard, the regulations provide that the Department will make available to the Commission the injury information the Department considered prior to its initiation decision.[30] Moreover, applicable WTO law requires the Department to consider injury information prior to any self-initiation.[31]

As part of its injury analysis, the Department should consider quantity and value information for those imports that fall within the HTSUS numbers that domestic apparel

---

[29] The Department may self-initiate an antidumping investigation only if it determines based on "information available to it" that a "formal investigation is warranted" into the question of whether the necessary elements for the imposition of an antidumping duty exist. See 19 U.S.C. § 1673a(a)(1). Injury and causation are necessary elements.

[30] See 19 C.F.R. § 351.201.

[31] See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Antidumping Agreement") ("{Self-initiations} shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.").

manufacturers have self-identified as covering a product they produce in the United States for sale on the U.S. commercial market. Further, with respect to these HTSUS numbers, the Department should focus on the information that the U.S. Government collects as part of the Customs entry process in the normal course and/or data that are otherwise readily available to the U.S. Government. No self-initiation should ever be considered absent a substantial increase in the volume of properly monitored imports and a simultaneous decrease in the average value of such imports, as demonstrated by the available Customs data, adjusted for quality, seasonality, quota costs, if any, and other possible causes for fluctuations in average value.

The Department also sought comment on whether it should undertake intermittent, mid-term, or staged analyses of import data and market trends. We believe such analyses are ill advised. Here again, we note that the Administration's September 28, 2006 Letters to Senators Dole and Graham – which state that the Department "will conclude a review every six months as to whether there is sufficient evidence to initiate an antidumping investigation" – directly contradicts the Department's stated objective not to prejudge. Even reviews of six months are too short a period of time from which to extract meaningful data or trends. Far from providing reliable information, any analysis in the midst of the six-month review period would be distortive in that it could overstate any increases or decreases in import volume or value. The garment industry is highly seasonal. Data for one fiscal quarter, or even a half-year, provide an incomplete picture of import data and market trends, not to mention the further risk of financial data anomalies. If the Department monitors imports during the first half of 2007, it must address the impact of seasonality on import value by comparing first half 2007 data with first half 2006 data, not second half 2006 data.[32]

In addition to quantity and value information, the Department will need to collect and assess information from domestic producers relating to the impact the monitored imports have had, if any, on domestic operations. In this regard, as a condition for self-initiation, the Department should require that domestic producers accounting for at least 75% of the value of U.S. production of the identical product during the most recently completed four calendar quarters have provided all of the information concerning injury and causation that would be required in a petition and the Commission's Producer Questionnaire for a preliminary investigation, including data regarding "all relevant economic factors" that have a bearing on the domestic industry, such as (i) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; (ii) factors affecting domestic prices; (iii) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; and (iv) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product.[33] We note that the Commission itself would require submission of such information (subject to subpoena) shortly after any self-initiation, at which point failure to supply it in practice would lead to a negative Commission finding.

---

[32] Furthermore, the Department must also account both for any end of quota costs and any shifting of product composition in its consideration of import value.

[33] 19 U.S.C. § 1677(7).

Such data must form the basis of any Department decision to self-initiate. The Department should assess such evidence using the same standards that the Department would bring to bear on an industry-filed petition, with one caveat. By the terms of the Administration's September 28, 2006 Letters to Senators Dole and Graham, threat of material injury and material retardation are inapplicable to the proposed monitoring system and biannual review process. The letters state: "If this monitoring process indicates that dumping exists and the domestic textile industry fully cooperates in supplying data available to the domestic industry ***indicating the existence of material injury caused by such imports***, the Department will self-initiate antidumping investigations with respect to relevant products." (emphasis added). In the letters, the Secretary and the U.S. Trade Representative included only material injury, and by doing so, excluded threat of material injury and material retardation as relevant considerations.

3. The Department Should Determine Whether a Requisite Level of Domestic Support Exists

As it does with industry-filed petitions, the Department should also consider in its biannual evaluation process whether a self-initiation would have a requisite level of support from the domestic industry. The level of industry support is critical to the biannual evaluation process because it ensures that the Department does not waste limited resources taking action that domestic producers do not support. Accordingly, during each six-month review period, the Department should poll the domestic industry to determine whether there is such sufficient support. Consistent with the statutory guidance for industry-filed petitions, support would be insufficient unless self-initiation was supported by domestic producers or workers accounting for (i) 25% of the total production of the product; and (ii) 50% of the production expressing a view in support of, or opposed to, the self-initiation.

* * *

While we maintain our concern that any Department self-initiation based on data obtained through the monitoring program would be unlawful, to the extent that the Department self-initiated nevertheless, it should be bound to follow the procedures outlined in the section below.

D. Self-Initiations

In the event that the Department were to make the extraordinary decision to self-initiate an antidumping investigation against a particular product, the Department should implement measures to ensure that the information upon which any self-initiation would be based is accurate. Similar to its duty to substantiate the information in industry-filed petitions prior to initiation, 19 C.F.R. § 351.203, the Department in the context of self-initiations should take analogous steps to ensure that the initiation of the investigation is lawful. To this end, the Department must issue a preliminary notice of initiation and hold a hearing on that decision in advance of a final determination to initiate. If the Department were to proceed with a final determination of self-initiation, any such initiation determination, by law, could not address critical circumstances.

1. The Department Should Substantiate its Initiation Determination Prior to Finalizing Initiation

As the Department is well aware, in the context of industry-filed petitions, the "proceeding" begins on the date of the filing of the petition.[34] At that point the Department can establish an Administrative Protective Order ("APO"), and interested parties can apply for and ultimately receive business proprietary information that the domestic industry provided. Furthermore, the Department has a 20-day period to consult with the Commission regarding injury issues and to ensure that the petition is otherwise sufficient. Moreover, as a matter of practice, the Department may meet with petitioners prior to their filing to provide informal guidance as to the sufficiency of the petition. Procedures such as these ensure that the initiation pursuant to an industry-filed petition is lawful.

We propose that the Department issue a preliminary determination to self-initiate, if it should decide to take that step. A preliminary determination – in essence, the equivalent of the filing of a petition by domestic industry – would replicate the prudent measures currently in place for pre-initiation consideration of industry-filed petitions. Following the publication of the preliminary determination in the Federal Register, the Department could establish an APO (*i.e.*, the preliminary determination would begin the proceeding) and afford interested parties the opportunity to apply for access to proprietary information under the APO. Once approved, the Department should provide to parties under APO access to the calculations and information upon which the Department's preliminary decision to initiate was based, just as APO-approved parties may obtain copies of the APO version of a petition prior to initiation. Interested parties should have a 20-day period (or longer, if necessary) within which to submit comments and information relevant to "the accuracy and adequacy of the evidence" upon which the Administration has preliminarily decided to self-initiate the investigation, and whether there is adequate domestic industry support for the initiation.[35]

In addition, the Department should hold a public hearing to consider whether the information upon which the preliminary determination to self-initiate was based was accurate and adequate with respect to the product itself, injury factors, and domestic industry support. The Department's stated concern not to prejudge should obligate it to consider such comments and information and to rescind the preliminary self-initiation upon review of such comments and information, if appropriate.

Finally, in addition to consulting with private interested parties, the Department should seek input from within the Administration. In this regard, self-initiation should only occur after recommendation by the Trade Policy Staff Committee and approval of the President. The monitoring system should explicitly incorporate this approval requirement.

To the extent that the Department decides to move forward with a final determination of self-initiation, such determination, by law, could not address critical circumstances, as described more fully below.

---

34 19 C.F.R. § 102.

35 See 19 U.S.C. § 1673a(c)(1)(A)-(B).

2. Critical Circumstances

The Administration's September 28, 2006 Letters to Senators Dole and Graham state that, as part of the six-month review process under the Import Monitoring Program, the Department will determine "whether there is sufficient evidence to initiate an antidumping investigation...and, if so, whether critical circumstances exist that would allow for preliminary duties to be applied retroactively." The Department's December 4, 2006 Request for Public Comment is silent on this issue. Assuming that the September 28, 2006 Letters continue to correctly state the Department's intentions, an approach which would have the Department make a critical circumstances determination before initiation of an investigation and before the ITC preliminary determination is inconsistent with the statute and well-established Department practice.

Under Section 733(e) of the Act, as amended, 19 U.S.C. § 1673b, the Department may only determine the existence of critical circumstances "after the initiation of the investigation." Consistent with the exceptional nature of retroactive application of duties and U.S. obligations under the WTO Agreements, Congress provided no exception to the basic procedural rule that critical circumstances may not predate initiation of an investigation. The statute expressly prohibits the Department's intended approach to make critical circumstances determinations when it decides whether initiation is warranted.

Further, as explained in the Department's Policy Bulletin 98/4: Timing of Issuance of Critical Circumstances Determinations, a key factor in the determination of critical circumstances is the preliminary determination of the ITC concerning the reasonable indication of injury, or the threat thereof, to the domestic industry at issue.[36] As the Department explained in this Policy Bulletin, in light of the importance of the Commission's preliminary injury analysis to a critical circumstances determination, "we anticipate that the earliest point at which a critical circumstances determination would be made is shortly after the Commission's preliminary injury determination, which normally occurs 45 days after the filing of the petition" (emphasis added). Thus, the Department's planned approach appears to disregard not only the black letter of the statute, but also the Department's own policy for conducting critical circumstances analyses.[37]

---

[36] Policy Bulletin 98/4: Timing of Issuance of Critical Circumstances Determinations, *available at* http://ia.ita.doc.gov/policy/bull98-4.txt. In determining whether critical circumstances exist, the statute requires the Department to analyze, inter alia, whether there is a history of material injury by reason of the dumped imports. See Section 733(e)(1)(A) of the Act, 19 U.S.C. § 1673b(e)(1)(A).

[37] In addition to a reasonable indication of injury, the importer must have known, or should have known, that the imported products were dumped. See id. Using "production templates" -- a concept nowhere found in the statute -- as the test for whether importers knew or should have known that the Vietnamese garments were dumped cannot satisfy the statutory knowledge requirement, for any value established by production templates are mere approximations of fair value, and as such, cannot possibly form the basis of the required importer knowledge.

A more cautious approach to the issuance of critical circumstances determinations is particularly warranted where, as with the Department's announced Import Monitoring Program, the Department is contemplating self-initiation rather than initiation pursuant to an industry-filed petition. Where the Department must gather such factual information on its own, it seems wholly irrational that the Department would seek to issue a critical circumstances finding at a date prior to even the earliest date utilized when the Department receives from industry a complete and adequate petition.

We therefore urge the Department to clarify its intentions concerning the application of the critical circumstances analysis for purposes of the planned Import Monitoring Program, and to ensure that any critical circumstances determination will be made consistent with the statute and the Department's own policies and practices. Given the chilling effect that the prospect of retroactive duty assessment has on trade, adhering to the statute and normal practice is important, especially where, as here, there is absolutely no evidence that Vietnamese garment exporters will, or plan to, abuse Vietnam's PNTR status with the United States.

* * *

In conclusion, we respectfully request the Department to withdraw the proposed Import Monitoring Program. In the event the Department does proceed, we urge the Department to address the concerns set forth in the foregoing.

Respectfully submitted,

U.S. Association of Importers of Textiles and Apparel
National Retail Federation
American Apparel and Footwear Association
Retail Industry Leaders Association
Travel Goods Association
American Import Shippers Association
Liz Claiborne, Inc.
Polo Ralph Lauren
Gap, Inc.
J.C. Penney Corporation, Inc.
and J.C. Penney Purchasing Corp.
Nike, Inc.
Federated Department Stores
Perry Ellis International
Kohl's Department Stores Inc.
The Children's Place
Ann Taylor Inc.
Paul Davril, Inc.
The Levy Group
Eddie Bauer, Inc.
Bernard Chaus Inc.
Phillips-Van Heusen Corporation

Prepared by:

Gary N. Horlick
Wilmer Cutler Pickering
Hale and Dorr LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6050

Brenda A. Jacobs
Sidley Austin LLP

1501 K Street, NW
Washington, DC 20005
(202) 736-8149

Valerie A. Slater
Akin Gump Strauss Hauer
& Feld LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4112

Exhibit 1

The Honorable Elizabeth Dole
United States Senate
Washington, D.C. 20510

SEP 2 8 2006

Dear Senator Dole:

Thank you for sharing with the Administration your concerns regarding granting Permanent Normal Trade Relations (PNTR) to Vietnam and its possible effect on the domestic textile industry. We understand the sensitivity of these issues for the textile industry at a time of increased global competition after the end of worldwide quotas.

In the course of the negotiations on our bilateral market access agreement that is part of Vietnam's accession to the World Trade Organization ("WTO"), we consulted closely with the domestic textile industry. The bilateral agreement contains a unique mechanism to ensure that Vietnam will live up to its obligations to immediately end all WTO-prohibited subsidies for textile and apparel goods. Specifically, in addition to the standard remedies for WTO-prohibited subsidies already available to the United States through WTO dispute settlement, we have taken the unprecedented step of adding an enforcement mechanism that would allow for the prompt reimposition of quotas on textile and apparel goods, if Vietnam fails to fulfill its obligations to eliminate WTO-prohibited subsidies immediately upon becoming a WTO Member.

We understand that some of your constituents nevertheless remain concerned that, notwithstanding these undertakings, Vietnam may continue to offer prohibited subsidies to the state run textile and apparel industry, which could result in unfair competition in this sector, possibly including dumping in the U.S. market. The WTO system allows U.S. producers injured by any such dumping to seek antidumping remedies against Vietnamese imports being sold for less than fair value in the United States. However, according to domestic textile industry representatives, the structure of the U.S. textile and apparel industry may make it difficult for them to make effective use of this remedy.

The Administration is prepared to systematically monitor and review U.S. imports of textile and apparel goods from Vietnam and such data will be made publicly available on a monthly basis. Specifically, upon entry of Vietnam into the WTO and for the duration of this Administration, the Department of Commerce (the Department) will conclude a review every six months as to whether there is sufficient evidence to initiate an antidumping investigation of any textile or apparel goods from Vietnam pursuant to section 732(a) of the Trade Act of 1930 (19 U.S.C. § 1673a(a)), and, if so, whether critical circumstances exist that would allow for preliminary duties to be applied retroactively. The Department is responsible for initiating and conducting antidumping investigations and would examine whether initiation of an antidumping action would be warranted under U.S. law and the applicable WTO rules.

The Department will begin a comprehensive program to monitor imports of textile and apparel products from Vietnam, including the import values and volumes of these goods. In order to do this, the Department will construct, in consultation with industry, production templates for textile and apparel products of interest in order to determine the inputs and other factors that contribute to the fair market price of a good. As long as Vietnam is considered a non-market economy for antidumping purposes, the Department will use a proxy country for this monitoring program in order to assess whether Vietnamese goods may be dumped into the U.S. market. If this monitoring process indicates that dumping exists and the domestic textile industry fully cooperates in supplying data available to the domestic industry indicating the existence of material injury caused by such imports, the Department will self-initiate anti-dumping investigations with respect to the relevant products. For the duration of this Administration, as part of the monitoring system, the Department will take note of the special sensitivity to the domestic industry of trousers, shirts, underwear, swimwear, and sweaters and the Department will make available to interested private-sector parties as much of the information it gathers as possible. In addition, the Department will endeavor to prepare templates and monitoring criteria that are consistent with its current dumping methodologies, however, consistent with the quasi-judicial nature of antidumping investigations, the Department may not prejudge the specific methodologies or information that would be utilized in any particular investigation.

We hope this will help to alleviate the domestic textile industry's concerns and look forward to working with you on this approach. If you have any further questions, please contact Nat Wienecke, Commerce Assistant Secretary for Legislative and Intergovernmental Affairs, at (202) 482-3663, or Justin J. McCarthy, Assistant U.S. Trade Representative for Congressional Affairs, at (202) 395-3406.

Sincerely,

Susan C. Schwab
United States Trade Representative

Carlos M. Gutierrez
Secretary of Commerce

SEP 2 8 2006

The Honorable Lindsey Graham
United States Senate
Washington, D.C. 20510

Dear Senator Graham:

Thank you for sharing with the Administration your concerns regarding granting Permanent Normal Trade Relations (PNTR) to Vietnam and its possible effect on the domestic textile industry. We understand the sensitivity of these issues for the textile industry at a time of increased global competition after the end of worldwide quotas.

In the course of the negotiations on our bilateral market access agreement that is part of Vietnam's accession to the World Trade Organization ("WTO"), we consulted closely with the domestic textile industry. The bilateral agreement contains a unique mechanism to ensure that Vietnam will live up to its obligations to immediately end all WTO-prohibited subsidies for textile and apparel goods. Specifically, in addition to the standard remedies for WTO-prohibited subsidies already available to the United States through WTO dispute settlement, we have taken the unprecedented step of adding an enforcement mechanism that would allow for the prompt reimposition of quotas on textile and apparel goods, if Vietnam fails to fulfill its obligations to eliminate WTO-prohibited subsidies immediately upon becoming a WTO Member.

We understand that some of your constituents nevertheless remain concerned that, notwithstanding these undertakings, Vietnam may continue to offer prohibited subsidies to the state run textile and apparel industry, which could result in unfair competition in this sector, possibly including dumping in the U.S. market. The WTO system allows U.S. producers injured by any such dumping to seek antidumping remedies against Vietnamese imports being sold for less than fair value in the United States. However, according to domestic textile industry representatives, the structure of the U.S. textile and apparel industry may make it difficult for them to make effective use of this remedy.

The Administration is prepared to systematically monitor and review U.S. imports of textile and apparel goods from Vietnam and such data will be made publicly available on a monthly basis. Specifically, upon entry of Vietnam into the WTO and for the duration of this Administration, the Department of Commerce (the Department) will conclude a review every six months as to whether there is sufficient evidence to initiate an antidumping investigation of any textile or apparel goods from Vietnam pursuant to section 732(a) of the Trade Act of 1930 (19 U.S.C. § 1673a(a)), and, if so, whether critical circumstances exist that would allow for preliminary duties to be applied retroactively. The Department is responsible for initiating and conducting antidumping investigations and would examine whether initiation of an antidumping action would be warranted under U.S. law and the applicable WTO rules.

The Department will begin a comprehensive program to monitor imports of textile and apparel products from Vietnam, including the import values and volumes of these goods. In order to do this, the Department will construct, in consultation with industry, production templates for textile and apparel products of interest in order to determine the inputs and other factors that contribute to the fair market price of a good. As long as Vietnam is considered a non-market economy for antidumping purposes, the Department will use a proxy country for this monitoring program in order to assess whether Vietnamese goods may be dumped into the U.S. market. If this monitoring process indicates that dumping exists and the domestic textile industry fully cooperates in supplying data available to the domestic industry indicating the existence of material injury caused by such imports, the Department will self-initiate anti-dumping investigations with respect to the relevant products. For the duration of this Administration, as part of the monitoring system, the Department will take note of the special sensitivity to the domestic industry of trousers, shirts, underwear, swimwear, and sweaters and the Department will make available to interested private-sector parties as much of the information it gathers as possible. In addition, the Department will endeavor to prepare templates and monitoring criteria that are consistent with its current dumping methodologies, however, consistent with the quasi-judicial nature of antidumping investigations, the Department may not prejudge the specific methodologies or information that would be utilized in any particular investigation.

We hope this will help to alleviate the domestic textile industry's concerns and look forward to working with you on this approach. If you have any further questions, please contact Nat Wienecke, Commerce Assistant Secretary for Legislative and Intergovernmental Affairs, at (202) 482-3663, or Justin J. McCarthy, Assistant U.S. Trade Representative for Congressional Affairs, at (202) 395-3406.

Sincerely,

Susan C. Schwab
United States Trade Representative

Carlos M. Gutierrez
Secretary of Commerce